UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	C.R. No. 17-68WES
	:	
RICHARD F. WOODHEAD	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Based on his guilty plea to a single-count information charging attempted receipt of child pornography pursuant to 18 U.S.C. § 2252(a)(2) and (b)(1), on December 15, 2017, Petitioner Richard F. Woodhead was sentenced to five years, the applicable mandatory minimum, consistent with the joint recommendation of the government and his retained attorneys, John Calcagni, III, Esq., and John MacDonald, Esq. ECF No. 43. Petitioner's *pro se*[1] direct appeal was filed on February 1, 2018, thirty-three days after the due date of December 29, 2017. It was dismissed as untimely by the First Circuit on August 28, 2018. Within the one-year period for collateral motions, on December 14, 2018, Petitioner returned to this Court with a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255 ("original § 2255 motion"). ECF No. 64. A few days later, Petitioner filed a *pro se* motion (ECF No. 65) to dismiss the remaining charges in the original criminal complaint (attempted coercion and enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) and possession of child

[1] From the filing of the petition until counsel was appointed on September 13, 2019, Petitioner was *pro se*. As required in this Circuit, his *pro se* filings have been "construed with some liberality." Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 23 (1st Cir. 2000).

pornography in violation of 18 U.S.C. § 2252(a)(4)). On October 25, 2019, the Court denied the motion to dismiss these "non-convicted" charges.[2]

After the government filed its opposition to the original § 2255 motion (ECF No. 73), on June 18, 2019, Petitioner moved to amend it. ECF No. 80. Because the amended § 2255 motion presented what might be a serious issue pursuant to the recent Supreme Court decision in Garza v. Idaho, 139 S. Ct. 738 (2019), and in light of the liberal standard for amending in Fed. R. Civ. P. 15(a), on July 26, 2019, without waiting for the government's opposition to the motion to amend, the Court granted leave to amend, leaving the government free to present any arguments (including with respect to the futility of the amendment) in opposition to the amended § 2255 motion. ECF No. 82. At the Court's direction, the amended motion was filed as ECF No. 82 ("amended § 2255 motion"). After the government filed its new opposition (ECF No. 87), the Court appointed CJA counsel for Petitioner; his attorney filed a reply on December 6, 2019. ECF No. 95.

Having reviewed the parties' filings and conducted a conference with counsel, I have determined that no hearing is necessary. For the reasons that follow, I recommend that the Court deny the amended § 2255 motion, as to its new grounds, because they are untimely and, as to the grounds that relate back to those stated in the original motion, because Petitioner has failed to sustain his burden of establishing the need for § 2255 relief.

I. BACKGROUND

On April 6, 2017, Petitioner, a resident of South Attleboro and a police officer in Attleboro, Massachusetts, was arrested and charged by a criminal complaint with attempted coercion and enticement of a minor to engage in sexual activity (18 U.S.C. § 2422(b)), attempted

[2] If allowed to withdraw his plea, Petitioner remains at risk that the government may proceed against him on these charges, one of which (enticement) carries a mandatory ten-year minimum sentence.

receipt of child pornography (18 U.S.C. § 2252(a)(2)) and possession of child pornography (18 U.S.C. § 2252(a)(4)). Factually, the criminal complaint alleged that Petitioner, using a false persona, repeatedly posted an on-line advertisement entitled "Perv on Your Daughter," solicited nude and sexually-arousing pictures of a child from an undercover officer who responded to "Perv on Your Daughter," discussed meeting with a hypothetical eight-year-old for sexual purposes and was found to be in possession of child pornography unrelated to "Perv on Your Daughter" based on a search of his residence. ECF No. 4. On April 11, 2017, Petitioner engaged John Calcagni, III, Esq., and John MacDonald, Esq., to represent him. After the retained attorneys entered the case, the Court released Petitioner on bail and granted two extensions of the Speedy Trial Act deadline for indictment for plea negotiations and discovery, as jointly requested by the parties. ECF Nos. 21, 24.

Several days before the reset deadline for indictment under the Speedy Trial Act, on July 25, 2019, an information was filed, together with a Plea Agreement. ECF Nos. 25, 26. The information charged only attempted receipt of child pornography pursuant to 18 U.S.C. § 2252(a)(2); in the Plea Agreement, Petitioner stated his intent to plead guilty to that charge. He also agreed to "waive[] Defendant's right to appeal the conviction and sentence imposed," as long as the sentence imposed is "within or below the sentencing guideline range determined by the Court." ECF No. 26 ¶ 11. The Plea Agreement recites that it was signed following discussion of its terms with retained counsel. Id. ¶ 16.

At the change of plea hearing held on August 18, 2017, the government summarized the facts that would be established at trial. ECF No. 37 at 11-15. These included:

- Petitioner's repeated ("multiple times") use of a false on-line persona to post "Perv on Your Daughter" over a four-month period, by which he solicited fathers to send him ("I want to . . . [m]aybe see") nude and

sexually provocative pictures of "your sweet, innocent daughter" (ECF No. 4 at 2);

- Petitioner's solicitation of nude and sexually-arousing photographs of a fictional young child, a "daughter," as well as his discussion of meeting and having a sexual encounter with the child, in emails (using his false persona) and three recorded telephone conversations with a Rhode Island State Police undercover who responded to "Perv on Your Daughter" and pretended to be the child's stepfather; and

- Unrelated to "Perv on Your Daughter," Petitioner's possession of pornographic images of children (a video of prepubescent boys and nude and lascivious photographs of minor teenage girls) found in a hiding place in Petitioner's home.

ECF No. 37 at 11-15. Having first been placed under oath, Petitioner advised the Court that he agreed with the factual summary, did not disagree with any of it or believe that any of it was incorrect, and lodged a plea of guilty to the charge of attempted receipt of child pornography. Id. at 15. He also confirmed that the decision to plead guilty was his own, made because he believed it was in his best interest to do so. Id. at 5. Following an extended colloquy, Defendant's guilty plea was accepted by the Court and he was adjudged guilty.

At the sentencing on December 15, 2017, the Court expressed concern that "it's at least arguable" that the agreed-upon recommended sentence (five years) was "inadequate to protect the public because these are the messages of someone who is a predator." ECF No. 84 at 14. In response to the Court's concern, the government explained its decision not to pursue the charge of attempted enticement (which carries a mandatory minimum of ten years): "the investigation . . . was compromised by the fact that the defendant learned of it." Id.; see id. at 7 (prosecutor proffers facts permitting inference that, on same day defendant became aware of investigation, he broke off communications with undercover, saying, "don't ruin her life," deleted the email account used for "Perv on Your Daughter" communications, and wiped his telephone using a specialized application). Based on this explanation, the Court advised Petitioner that he was not

being sentenced based on speculation regarding what might have happened if he had not broken off communications with the undercover – "[a]nd this is a case where there's a lot of smoke but we can't really see the fire. And we don't know what would have happened if the – if you had not become aware of the other cases having been broken and if the investigation had proceeded." Id. at 20. Consistently, the sentence imposed was based on the joint recommendation of the parties and was within the guidelines range based on the statutory mandatory minimum in 18 U.S.C. § 2252(b)(1). Immediately before imposing sentence, the Court told Petitioner, "I think you're very fortunate that the way this ended up was with you pleading to the information to the charge that you pled to and that you didn't playout these other charges." Id. at 20-21. After imposing the sentence, the Court advised Petitioner that the provision of the Plea Agreement providing for waiver of the right to appeal was triggered. Id. at 25. At the end of the sentencing hearing, Petitioner was immediately remanded into custody. Id. at 28. Judgment (ECF No. 44) entered the same day, making December 29, 2017, the deadline for filing an appeal.

Petitioner did not mail his *pro se* notice of appeal until February 1, 2018. On August 28, 2018, the First Circuit dismissed the appeal as untimely. Four months later, on December 14, 2018, almost a year after the deadline to appeal passed, Petitioner filed the original § 2255 motion (ECF No. 64).

Petitioner's original § 2255 motion asserts seven claims that boil down to his contention that the government's evidence against him was insufficient to prove the charge of attempted receipt of child pornography so that his attorneys provided "complacent and ineffective" assistance in advising him to plead guilty. Many of these arguments focus – somewhat illogically – on the weaknesses in the government's evidence of attempted coercion and enticement (18 U.S.C. § 2422), a charge it abandoned in the Plea Agreement; the problems with

proving this charge were conceded during its explanation for why it was not seeking a ten-year mandatory minimum sentence. ECF No. 84 at 7 ("[H]e was able to cover his tracks at that time and began to destroy evidence. He broke off contact with the undercover."). In passing, not as a claim, but by way of explanation for why his "original appeal attempts were not perfectly timed," ECF No. 64 at 26, the original § 2255 motion mentions communications with his attorneys about the appeal waiver and their failure to tell him when an appeal would be due. Id. at 3-4, 26-27.

After the government filed its opposition to the original § 2255 motion, on May 13, 2019, Petitioner filed a motion to extend time for his reply. ECF No. 79. In the motion to extend, he asserted for the first time: "[f]ollowing sentencing, Mr. Woodhead intended to file an appeal, but his attorney failed to comply with Woodhead's request to do so." Id. at 1. Then, a little over a month later, instead of a reply, on June 18, 2019, Petitioner filed a motion for leave to amend the original § 2255 motion. The amended § 2255 motion was filed almost six months after December 29, 2018, which is one year following the day when the judgment became final.

In the amended § 2255 motion, Petitioner asserts for the first time a claim based on Roe v. Flores-Ortega, 528 U.S. 470 (2000), which holds that prejudice is presumed when an attorney violates a duty to consult with a client about an appeal either when a particular defendant reasonably demonstrated to the attorney that he was interested in appealing or when the circumstances are such that a rational defendant would want to appeal. Id. at 480. Based on Flores-Ortega, the amended § 2255 motion alleges that Petitioner "consulted with counsel and was advised that he had waived his right to appeal, and thus counsel declined to file a motion of appeal. . . . [C]ounsel failed to execute his ministerial duty to file a notice of appeal as requested by Woodhead." ECF No. 82 at 7, 9; id. at 24-25 ("Directly after the sentence was imposed, . . .

[Petitioner] requested that counsel file a NOA to commence the [direct appeal] process. . . . Counsel . . . misinformed Woodhead that he could not appeal because . . . the waiver provisions in the guilty plea precluded appeal."). The amended § 2255 motion also adds other new claims and reprises some, but not all, of the claims in the original § 2255 motion based on the insufficiency of the evidence resulting in a guilty plea procured through ineffective assistance of counsel. Id. at 8.

After the matter was referred to me for report and recommendation, I granted the motion to amend, directed that the amended petition be filed and that the government's opposition to it should address Garza, 139 S. Ct. at 738, which extends the holding of Flores-Ortega to a defendant (like Petitioner) who signed a plea agreement that expressly waived all rights of appeal. Id. at 749-50. Finding Petitioner eligible for court-appointed counsel and that the legal complexity of the merits of the motion coupled with Petitioner's significant legal jeopardy if he succeeds in withdrawing his plea and has to face the other two charges pending in the criminal complaint, I also appointed CJA counsel to represent him.

The government's response makes alternative arguments.

First, the government argues that all new claims in the amended § 2255 motion should be denied as untimely.[3] This argument is focused on Petitioner's argument of ineffective assistance of counsel based on the alleged failure to file an appeal as instructed and the failure to

[3] The government frames this argument as a motion for reconsideration of the granting of the motion to amend, which would be fully within the Court's discretion. See Narragansett Indian Tribe v. Hendrickson, C.A. No. 1:19-cv-00158-MSM-PAS, 2020 WL 65087, at *1 (D.R.I. Jan. 7, 2020) ("a district court 'always has the inherent power to reconsider its interlocutory rulings'") (quoting Warren v. Am. Bankers Ins. of Fla., 507 F.3d 1239, 1243 (10th Cir. 2007)). However, in this instance, a motion for reconsideration is not necessary because the Court's arguably premature granting of the motion to amend prevented the government from presenting its futility arguments, including its argument that Petitioner's amended § 2255 motion was untimely and relation back does not apply to at least some of its claims. Here, the Court exercised its discretion to grant the motion to amend, leaving the government free to marshal its futility arguments in its opposition to the motion, which it has done. The Court has not (until now) addressed the government's arguments. So there is nothing to reconsider.

meaningfully consult about an appeal, neither of which were asserted as claims in the original § 2255 motion. As such they do not "relate back" to the claims in the timely filed original § 2255 motion pursuant to Fed. R. Civ. P. 15(c)(2). Because the amendment was filed months after the running of the one-year limitation period in 28 U.S.C. § 2255(f), the new claims are untimely. As to the balance of the arguments in the amended § 2255 motion, the government argues that they fail because, as to the ineffective assistance claims, they are without merit in that Petitioner has failed to sustain his burden of showing either a deficient performance or prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984), as well as that all others (if any) fail because they are procedurally barred by Petitioner's guilty plea and failure to file a timely appeal. See Oakes v. United States, 400 F.3d 92, 95 (1st Cir. 2005) ("federal habeas petitioner challenges his conviction or sentence on a ground that he did not advance on direct appeal, his claim is deemed procedurally defaulted"); United States v. Cruz-Rivera, 357 F.3d 10, 14 (1st Cir. 2004) (argument based on insufficiency of evidence of interstate commerce element of crime waived by unconditional guilty plea and cannot be advanced on appeal); United States v. Lasseque, Cr. No. 13-111 WES, 2018 WL 3405247, at *3 (D.R.I. July 12, 2018) (§ 2255 should be denied when claims are meritless, procedurally barred and/or unsupported).

Alternatively, and only if the Court does not dismiss the new Flores-Ortega/Garza argument in the amended § 2255 motion as untimely, the government proposes a resolution of that argument only. Based on interviews of the two attorneys, the government learned that one of them met with Petitioner shortly after the sentence was imposed and that Petitioner expressed dissatisfaction about both the length of the period of incarceration and the period of supervision. In response, the defense attorney did not ignore Petitioner or fail to consult; rather, he reminded Petitioner that five years to serve was consistent with the Plea Agreement; he conducted a

discussion with Petitioner about the ten-year term of supervision and wrote a follow-up letter of advice; he did not otherwise discuss an appeal; he was not instructed to file an appeal. ECF No. 87 at 6. Based on this information, and mindful of the evolving state of the law, including not only Garza, but also the First Circuit's more recent decision in Rojas-Medina v. United States, 924 F.3d 9 (1st Cir. 2019), which may be interpreted as holding that the duty to consult about appeal can be triggered by nothing more than a defendant's expression of displeasure with the sentence,[4] the government proposes that the Court grant the § 2255 motion for the specific and limited purpose of vacating the sentence and resentencing by imposing the same sentence pursuant to the Plea Agreement, leaving Petitioner free to raise the other arguments in both the original and the amended § 2255 motions on direct appeal upon the filing of a timely notice of appeal or, to the extent that they are not cognizable on direct appeal, through a timely § 2255 motion to vacate.

In reply, Petitioner brushes aside the government's timeliness argument. He responds only to the government's willingness to agree to resolve his claim of ineffective assistance based on the failure to file an appeal or the failure to consult on whether to bring an appeal – a limited grant of the amended § 2255 motion solely for resentencing by imposing the same sentence that would leave him free to bring a direct appeal – and rejects the notion. Instead, he represents that, if the amended § 2255 motion is granted as the government proposes, he will immediately move to withdraw his guilty plea to face whatever charges the government might bring by indictment.

II. STANDARD OF REVIEW

[4] The government made clear that it does not concede that the attorneys provided ineffective assistance in advising Petitioner about his appeal rights. Rather, to avoid an evidentiary hearing where the seemingly low bar in Rojas-Medina sets a controlling standard of which the attorneys were not aware at the time of their communication about appeal with Petitioner, it informed the Court that it is prepared to agree that the sentence may be vacated and re-imposed pursuant to the Plea Agreement, putting Defendant in the position to be advised about an appeal and to file a timely notice if he decides to do so.

A person may move to vacate his or her sentence on one of four different grounds: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction" to impose its sentence; (3) "that the sentence was in excess of the maximum authorized by law"; or (4) that the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a); see Knight v. United States, 37 F.3d 769, 772 (1st Cir. 1994). The burden is on the § 2255 petitioner to establish by a preponderance of the evidence that he or she is entitled to § 2255 relief. David v. United States, 134 F.3d 470, 474 (1st Cir. 1998). A collateral challenge is not a substitute for an appeal. United States v. Frady, 456 U.S. 152, 165 (1982); Berthoff v. United States, 308 F.3d 124, 127 (1st Cir. 2002). To obtain relief under § 2255, a defendant must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Deleon, Criminal No. 07-10277-NMG, 2016 WL 3747487, at *8 (D. Mass. May 9, 2016) (quoting Frady, 456 U.S. at 166).

"[A] defendant's failure to raise a claim in a timely manner at trial or on appeal constitutes a procedural default that bars collateral review, unless the defendant can demonstrate cause for the failure and prejudice or actual innocence." Berthoff, 308 F.3d at 127-28; see Daniels v. United States, 532 U.S. 374, 382-83 (2001) ("procedural default rules developed in the habeas corpus context apply in § 2255 cases"). An allegation of ineffective assistance of counsel can excuse a procedural default, but only if the petitioner demonstrates both that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the petitioner's defense. Williams v. United States, 858 F.3d 708, 715 (1st Cir. 2017) (citing Strickland, 466 U.S. at 687-88); Lasseque, 2018 WL 3405247, at *4. "The first requirement necessitates a demonstration that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." Williams, 858 F.3d at 715. "Judicial scrutiny of counsel's performance must be highly deferential." Caramadre v. United States, Cr. No. 11-186-WES, 2018 WL 5257621, at *3 (D.R.I. Oct. 22, 2018) (quoting Strickland, 466 U.S. at 689); see id. ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."). Thus, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Williams, 858 F.3d at 715. The prejudice requirement necessitates a demonstration of "a reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial." Lee v. United States, 137 S. Ct. 1958, 1965 (2017). Failure to prove either prong is fatal to the claim. Figueroa Quinonez v. United States, 365 F. Supp. 3d 233, 235 (D.P.R. 2019).

These principles apply in the context of guilty pleas. Caramadre, 2018 WL 5257621, at *3. That is, a "[c]ourt[] should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporary evidence to substantiate a defendant's expressed preferences." Id. (quoting Lee, 137 S. Ct. at 1967).

III. ANALYSIS

A. Ineffective Assistance in Failing to File or Meaningfully Consult Regarding Appeal

Without regard to whether there is merit in Petitioner's claim of ineffective assistance based on failure-to-file/failure-to-consult regarding an appeal, the government's argument that this claim must be dismissed as untimely is well founded. United States v. Roe, 913 F.3d 1285, 1299-1300 & n.22 (10th Cir. 2019) (when amended § 2255 raises attorney's failure to consult

regarding appeal based on evidence at hearing on § 2255 claim alleging failure to file appeal, district court should have dismissed amended § 2255 motion as untimely; error to address merits of failure to consult claim); United States v. Gonzalez, 592 F.3d 675, 679 (5th Cir. 2009) (despite fact that no appeal was filed, when amended § 2255 motion is filed more than one year after judgment became final, claim of ineffective assistance based on counsel's failure to file appeal properly dismissed as untimely)

A § 2255 motion to vacate a federal sentence is subject to a one-year statute of limitations. Pursuant to § 2255(f), the limitations period begins running from the latest specified dates, as follows:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
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> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). "In most cases, the trigger is the date upon which the judgment of conviction became final" pursuant to 28 U.S.C. § 2255(f)(1). Lopez v. United States, Criminal No. 06-00124-WS-B, 2014 WL 1604000, at *4 (S.D. Ala. Apr. 22, 2014).

When a timely § 2255 motion is amended outside of the one-year period, the Court must examine the amended motion claim-by-claim to determine whether each is timely. Capozzi v. United States, 768 F.3d 32, 33 (1st Cir. 2014). To avoid being time-barred, each claim in an untimely amended § 2255 motion must relate back to the claims in the original timely motion

pursuant to Fed. R. Civ. P. 15(c). For relation back to apply, the claims in the amended pleading must arise from the "same core facts" and not depend on events that are separate in time and type from the events on which the original claims depended. Mayle v. Felix, 545 U.S. 644, 657 (2005); Turner v. United States, 699 F.3d 578, 585 (1st Cir. 2012).

In this case, the "date on which the judgment of conviction becomes final" is December 29, 2017, which was the last day to appeal the final judgment that was entered by the Court on December 15, 2017. This finality date is tolled only by the filing of a timely appeal; an untimely appeal and its subsequent dismissal date are not pertinent. United States v. Plascencia, 537 F.3d 385, 388-89 (5th Cir. 2008) (listing cases supporting holding that time to file § 2255 motion is not tolled if federal prisoner filed untimely direct appeal; conviction becomes final for purpose of § 2255 on expiration of period to file timely direct appeal); Lopez, 2014 WL 1604000, at *4 (§ 2255 motion filed fifteen months after deadline for direct appeal is untimely because direct appeal was filed late). Nor can Petitioner rely on § 2255(f)(3) tolling, which applies when a "right has been newly recognized by the Supreme Court and made retroactively applicable"; it is well settled that Garza is not "retroactively applicable." Espinal v. United States, 08-cr-242 (ARR), 2020 WL 264918, at *3 (E.D.N.Y. Jan. 17, 2020) (Garza does not articulate a newly recognized retroactive right); United States v. Gibson, Cr. No. 16-00746 JMS, 2019 WL 5213838, at *3 (D. Haw. Oct. 16, 2019) (Garza is not expressly retroactive; dismissing untimely § 2255 motion based on counsel's failure to file timely appeal). And Petitioner has not attempted to argue tolling arising from an impediment or newly discovered evidence based on § 2255(f)(2) or (4). Similarly, he has not argued, nor does the Court observe any basis for finding, "extraordinary circumstances" sufficient to justify equitable tolling. Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (equitable tolling is only appropriate "when a movant

untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence."); United States v. Goguen, 1:11-cr-00003-JAW, 2019 WL 479502, at *9-10 (D. Me. Feb. 2, 2019) ("Equitable tolling affords . . . an exceedingly narrow window of relief."). Based on this analysis, it is clear that the original § 2255 motion was timely because it was filed three weeks before the one-year deadline, while the amended § 2255 motion is over five months late. That means that each of the amended motion's claims must "relate back" pursuant to Fed. R. Civ. P. 15(c) or be denied as untimely. Mayle, 545 U.S. at 656.

Relation back is allowed when the claim asserted in the amended petition "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). That is, amended habeas claims generally must arise from the "same core facts" and not depend on events or arguments that are separate in "time and type" from those on which the original claims were based. United States v. Ciampi, 419 F.3d 20, 23-24 (1st Cir. 2005) (citing Mayle, 545 U.S. at 656). In the § 2255 setting, whether to apply relation back is "strictly construed" to reflect Congress' decision to expedite habeas attacks "by placing stringent time restrictions on them." Id. at 23. Therefore, ineffective assistance claims asserted in an untimely amended § 2255 motion must align with great particularity with those asserted in the timely filed § 2255 motion or they should be dismissed as untimely. United States v. McCurdy, No. 1:06-CR-00080-JAW, 2013 WL 5431448, at *20 (D. Me. Sept. 27, 2013). This need for precision in requiring the same "conduct, transaction, or occurrence" is well illustrated by the guidance from our Circuit. For example, in Turner, the untimely amended § 2255 motion added a new ineffective assistance of counsel claim based on the failure to cross examine a government witness about prior inconsistent statements, while the original timely § 2255 motion focused on a different problem with the cross examination of the same witness; the

First Circuit found no abuse of discretion in the district court holding of no relation back. Turner, 699 F.3d at 585. And Ciampi affirms the finding of no relation back where the original petition claimed that the district court did not adequately inform the defendant of the consequences of his guilty plea, while the amended petition claimed ineffective assistance by the attorney for failing to fully advise the defendant when he pleaded guilty. Ciampi, 419 F.3d at 24.

Other Circuit Courts have been similarly strict. For example, in Roe, 913 F.3d at 1285, the Tenth Circuit affirmed the district court's refusal to allow relation back when the original § 2255 motion asserted failure to file an appeal, while the amended motion raised the claim of failure to meaningfully consult about an appeal. Id. at 1292-93, 1300. And the Fifth Circuit affirmed the denial of relation back when the original claim alleged errors during sentencing, while the amendment asserted counsel's failure to file an appeal to address those errors. Gonzalez, 592 F.3d at 680.

Viewed against this legal backdrop, it is plain that Petitioner's failure to file/failure to meaningfully consult claims are new, do not relate back and are therefore out of time.

The original § 2255 motion lays out seven discrete claims,[5] all of which relate to the sufficiency of the evidence supporting the three charges in the criminal complaint and the single

[5] The gravamen of the original § 2255 motion is ineffective assistance of counsel in connection with the plea negotiations and deficient advice regarding the decision to plead guilty. Specifically, read with the leniency applicable to any *pro se* filing, the original § 2255 motion claims that the attorneys provided deficient assistance in that they failed to advise Petitioner that:

1. The government lacked evidence of the requisite relationship with interstate commerce;
2. The government could not prove the elements of the offense, for example because there was no proof that Petitioner took steps towards attempting to receive child pornography;
3. Entrapment was an available defense that might have been successful;
4. The Petitioner's "last act" (the statement he made when he broke off contact with the undercover – "I am not interested, don't ruin her life") is strong evidence of innocence;
5. The government made an "incomplete" production of Brady evidence;
6. Petitioner's diagnosis as a "sex addict" and "drug addict," but not a pedophile, by an engaged psychologist means that he lacked the predisposition to commit the offense, as does his service as a police officer and status as a father;

charge to which Petitioner pled guilty; the original § 2255 motion alleges that Petitioner's attorneys failed to provide effective assistance because they "automatically assumed his guilt." ECF No. 64 at 3. None of these claims relate either to his attorneys' failure to file a notice of appeal or failure to meaningfully consult him about an appeal. To the extent that the issue of appeal is mentioned at all in the original § 2255 motion, it is mentioned in passing as part of the background and in the conclusion to explain why Petitioner filed his appeal out of time. Specifically, in the "Introduction of Facts" section of the motion, which precedes the claims, Petitioner notes that, "[i]t became more and more evident to Petitioner after his remand and through his own research using LEXIS-NEXIS that although his attorneys represented to him that he had no appeal rights pursuant to the waiver in the plea agreement, that he actually could appeal and wished to do so"; this assertion is never presented or characterized as a claim. Id. at 3-4. Again, in the "Conclusion," which follows the statement of the claims, Petitioner explains why "his original appeal attempts were not perfectly timely," writing, "had Petitioner defense counsel performed to minimum expectations, Petitioner would have been made aware of the restrictive time constraints and filed his NOA immediat[e]ly." Id. at 26-27. Importantly, even the government did not understand these passing references in the original § 2255 motion as raising a claim of failure to file appeal or failure to meaningfully consult about an appeal pursuant to Flores-Ortega/Garza; neither is addressed in its opposition.

Based on the foregoing, I find that the original § 2255 was timely, but that its claims are based on "core facts" that are entirely separate in "time and type" from the new claims of

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7. The government's evidence was insufficient to prove a crime in that it was the undercover who initiated contact with Petitioner and introduced the notion of sex with a "child," and there was no evidence that Petitioner knew the video disc located by law enforcement in his hiding place (he claimed he found it in the woods) contained child pornography.

ECF No. 64 at 4-26.

ineffectiveness based on the failure to file an appeal and the failure to meaningfully consult on whether to file an appeal. Mayle, 545 U.S. at 657. Accordingly, I find that the claims of failure to file/failure to meaningfully consult as stated in the amended § 2255 do not relate back to the original § 2255 motion. I further find that the amended § 2255 motion was filed more than five months after the deadline for a § 2255 motion. Therefore, I find that the claims of failure to file/failure to meaningfully consult are untimely and should be dismissed.

B. Viability of Balance of Claims in Amended § 2255 Motion

The remainder of the amended § 2255 motion[6] is laser-focused on Petitioner's claim that his attorneys were deficient in advising him during plea negotiations and in failing to move to withdraw his guilty plea. Boiled to the essence, he argues that the guilty plea lacked a factual foundation because there was no evidence that he took a "substantial step toward committing that crime [attempted receipt of child pornography]." ECF No. 80-1 at 14 (citing United States v. Pires, 642 F.3d 1, 8 (1st Cir. 2011)).

Two of the claims in Petitioner's amended § 2255 motion are entirely new, do not relate back and should be dismissed as untimely. Alternatively, and only if the Court rejects my recommendation that new claims in the amended § 2255 motion should be dismissed, these claims should be dismissed because they are without merit.

First, Petitioner contends that the attorneys rendered ineffective assistance during plea negotiations in that they failed to advise him of a Speedy Trial Act violation and of his option to

[6] I note that there are two claims from the original § 2255 motion that are omitted from the amended motion and are therefore abandoned. Braden v. United States, 817 F.3d 926, 930 (6th Cir. 2016) (rule that amended pleadings generally supersede original pleadings applies to habeas petitions). First, facing the government's opposition, which pointed out that complete transcripts of the telephone calls were produced in discovery, Petitioner has abandoned the claim of "incomplete Brady evidence." Second, with the government's explanation that the element of a relationship to interstate commerce is solidly established because the undercover was in Rhode Island and Petitioner was in Massachusetts during the telephone calls in issue, Petitioner has abandoned his claim that his attorneys should have advised him not to plead guilty because the government could not prove the requisite relationship to interstate commerce.

seek to dismiss the charges based on the violation. Apart from being brand new and therefore untimely, this argument is frivolous – the record reflects that the parties jointly requested extensions of the government's time to indict, which the Court allowed, specifically excluding the time between the Petitioner's arrest and the filing of the information. See ECF No. 21, 24. There is no Speedy Trial Act violation. Second, Petitioner seeks to support the claim of ineffective assistance during plea negotiations by focusing (for the first time) on a stipulation in the Plea Agreement (ECF No. 26 ¶ 4), which provides for a joint recommendation for an upward adjustment to the guidelines calculation based on an offense involving more than ten images. Petitioner argues that his attorneys should have advised him that this stipulation is based on a "misrepresentation" in that the only images of child pornography (four photographs and a video) are those found in the hiding place in his home, which were not "involved" in the charged offense because he did not receive them as a result of the "Perv on Your Daughter" posting. Whatever the merits of this argument,[7] it not only is new and therefore untimely, but also stumbles on the prejudice prong of the Strickland test. As Petitioner concedes, the guidelines calculation in this case ended up being based on the mandatory five-year minimum in 18 U.S.C. § 2252(b)(1). Whether there was a two-level enhancement for more than ten images did not matter.

[7] While it appears frivolous to suggest that Petitioner agreed to this stipulation due to a factual "misrepresentation," in that the government did not argue that these images were procured through "Perv on Your Daughter," Petitioner may be right that it is ambiguous whether the attempted receipt offense "involved" these unrelated images as a matter of law. See United States v. Dobbs, 629 F.3d 1199, 1209 (10th Cir. 2011) (attempted receipt conviction vacated because no link between evidence of defendant's attempts to procure child pornography and two images named in indictment). On the other hand, evidence that Petitioner had secreted child pornography in a hiding place in his home may well have been admitted at trial on the attempted receipt charge to rebut Petitioner's defense that he had no predisposition or intent to receive child pornography. See United States v. Nance, 767 F.3d 1037, 1042 (10th Cir. 2014) (addressing complex issue of admissibility at trial of evidence of possession of child pornography unrelated to indicted charges). Therefore, this stipulation falls comfortably within the "wide range of professionally competent assistance," United States v. Manon, 608 F.3d 126, 131 (1st Cir. 2010), and does not demonstrate any deficiency in the attorneys' negotiations of the Plea Agreement.

The remainder of the claims in Petitioner's amended § 2255 motion do relate back but should be denied because they are without merit.

First, Petitioner contends that his attorneys failed to advise him that the evidence supporting the charge to which he pled was insufficient. For example, he argues that there was "no evidence to establish Woodhead wanted to receive a visual depiction of a minor engaged in sexually-explicit conduct . . . , 'as required by the statute.'"[8] ECF No. 80-1 at 15. This is simply wrong. For starters, the "Perv on Your Daughter" posting, which Petitioner put on the internet himself multiple times, specifically asks responders not only to talk, but also to send him "nude" and provocative photographs of "your sweet, innocent daughter." ECF No. 73-1 at 1-2; see United States v. McCourt, 468 F.3d 1088, 1090 (8th Cir. 2006) (affirming, *inter alia*, conviction for attempted receipt of child pornography based on facts establishing that defendant "advertised in the chat rooms that he was seeking videos and images of 'young forced nudity' and 'young amateurs'"). Further, when the undercover told Petitioner that the "daughter" was eight-years old, Petitioner promptly asked him to send pictures and, when non-pornographic pictures were sent in response, he asked for more, "bikini pics or sexier ones." ECF No. 73-1 at 3; ECF No. 4 at 3. And later in his recorded conversations with the undercover, Petitioner specifically asked the undercover to send a nude picture. When asked to clarify what type of pictures he wanted to be sent, Petitioner became more explicit, corroborating his intent to receive nude and/or provocative images of an eight-year-old: "[i]f you any naked that'd be great, but whatever you got I just want to get like really horny for her." ECF No. 73-1 at 4; see United States v. Bauer, 626 F.3d 1004, 1008 (8th Cir. 2010) (affirming attempted receipt conviction of defendant who

[8] To prove attempt to receive child pornography pursuant to 18 U.S.C. § 2252(a)(2) and (b)(1), the government must show both that the accused intended to commit the underlying substantive offense (here, knowing receipt of child pornography) and that he took a substantial step toward committing that crime, but it need not prove each element of the underlying offense. Pires, 642 F.3d at 8.

believed undercover he was communicating with was fourteen-year-old girl; conversation to persuade her to send him images establishes "substantial step" in that it strongly corroborated intent to receive pornographic images). And there is other corroborating evidence that Petitioner knew that he was engaged in illegal conduct – for example, he used a false name and on-line persona for "Perv on Your Daughter," he asked the undercover if he was a cop and, when a press release issued about an arrest based on analogous allegations, on the same day, he broke off communications with the undercover and used a software product to wipe his devices clean. ECF No. 73-1 at 4-6.

Second, Petitioner contends that the attorneys were deficient in failing to advise him that he had a strong affirmative defense of entrapment in that the government induced him to engage in the criminal conduct and there is no evidence that he was predisposed to such conduct. This argument fails because its focus is on enticement, the crime for which Petitioner was not convicted or sentenced – he argues vehemently that the undercover tried to lure him into agreeing to and going to a meeting with a fictional eight-year-old child and that there is no evidence that he ever touched a child. By contrast, the crime to which Petitioner pled guilty – attempted receipt of child pornography –is solidly grounded in Petitioner's on-line advertisement, "Perv on Your Daughter," which he posted multiple times over a four month period, actively soliciting pictures described in the posting as "pictures of her sexy outfits, or maybe even nudes" or "pictures you keep secret while we both get hard perving on her" of "your sweet, innocent daughter." Id. at 2. The undercover played no role in inducing Petitioner to post "Perv on Your Daughter"; he simply responded. And Petitioner's predisposition to receive child pornography is corroborated not only by his aggressive pursuit of provocative or nude images of

an eight-year-old in his conversations with the undercover, but also by his possession of the pornographic images of children that he kept hidden in his home.

Third, Petitioner contends that the attorneys provided ineffective assistance at sentencing. Because, as he concedes, the guidelines calculation is not relevant in light of the five-year mandatory minimum, he shifts back to the guilty plea, arguing that the attorneys were ineffective in failing to move before sentencing to withdraw it. To support this argument, Petitioner reprises his core argument – the government did not have the ability to prove facts sufficient to establish the offense of conviction. In this iteration of the claim, he focuses on a comment by the Court during sentencing – "there's a lot of smoke, but we can't really see the fire" – to support the conclusion that the attorneys were deficient in not immediately moving to withdraw the plea. ECF No. 84 at 20. However, read in context, the Court's comment clearly refers to the offense for which Petitioner was not convicted (enticement); far from suggesting the insufficiency of the evidence of the crime to which Petitioner pled guilty, the Court was assuring Petitioner that the charge of enticement would not adversely affect his sentence for attempted receipt of child pornography. Indeed, when the sentencing transcript is read in its entirety, the Court's perspective is crystal clear – that Petitioner's five-year sentence was lenient and that Petitioner was "very fortunate that the way this ended up was with you pleading to the information to the charge that you pled to and that you didn't play out these other charges." Id. at 20-21; see Caramadre, 2018 WL 5257621, at *13 (where evidence demonstrated that counsel "negotiated a favorable plea agreement," defendant cannot "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

At bottom, Petitioner's sentencing transcript makes plain that at no point during the plea colloquy did he evince any hesitation, indecision, or desire to confer with counsel. Caramadre, 2018 WL 5257621, at *11 ("The Rule 11 colloquy provides strong evidence that [the defendant] pled guilty knowingly, intelligently, and voluntarily.") (citing United States v. Chambers, 710 F.3d 23, 29 (1st Cir. 2013)). In the headwinds of such a record, Petitioner cannot demonstrate that his attorneys' conduct was "outside the wide range of professionally competent assistance," or "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688-90. Therefore, he has not satisfied the first prong of the Strickland test. Caramadre, 2018 WL 5257621, at *12. The plea colloquy is equally fatal for the second Strickland prong, which requires a demonstration of prejudice based on "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. As the Supreme Court has held in clear terms, courts "should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies[, but rather] should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee, 137 U.S. at 1967. The contemporaneous evidence here substantiates Petitioner's sworn representation to the Court that he was pleading guilty because he thought it was in his best interest to do so. ECF No. 37 at 5.

Taking this tapestry as a whole, Pires, 642 F.3d at 9, I find that Petitioner's underlying arguments are thoroughly lacking in merit so that his ineffective assistance claims also fail. See Hoover v. United States, 1:13-cr-00018-JAW, 2016 WL 7396706, *6 (D. Me. Dec. 21, 2016) (citing Tse v. United States, 290 F.3d 462, 465 (1st Cir. 2002) (per curiam)). Accordingly, I recommend that the balance of the amended § 2255 motion be denied, both as to the new claims, which are untimely, and as to those that relate back because they are without merit.

IV. CONCLUSION

For the foregoing reasons, I recommend that Petitioner's amended § 2255 motion to vacate, set aside, or correct sentence be denied in part as time-barred and otherwise as meritless, procedurally barred, and/or unsupported, Lasseque, 2018 WL 3405247, at *3, and that judgment enter in favor of the United States of America and against Petitioner. Finding further that Petitioner is not entitled to the issuance of a certificate of appealability pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, I also recommend that the Court find that this case is not appropriate for the issuance of a certificate of appealability.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Crim. P. 59(b); DRI LR Cr 57.2(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
March 3, 2020